Filed 6/4/03 In re V.V. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re V. V., a Person Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. P. V., Defendant and Appellant.	C042597 (Super. Ct. No. JD215298)

P. V. (appellant), the father of V. V. (the minor), appeals from orders of the juvenile court denying his petition for modification and terminating his parental rights. (Welf. & Inst. Code, §§ 366.26, 388, 395.)[1] Appellant contends the juvenile court abused its discretion by denying his petition for modification and by failing to apply a statutory exception to

[1] Further undesignated section references are to the Welfare and Institutions Code.

termination of his parental rights. Finding no abuse of discretion, we affirm the orders.

FACTS AND PROCEDURAL HISTORY

On May 5, 2000, the Department of Health and Human Services (DHHS) filed an original juvenile dependency petition pursuant to section 300 on behalf of the one-year-old minor, a girl. The petition alleged that there was a substantial risk the minor would suffer serious physical harm due to the inability of the minor's mother to provide regular care for her as a result of the mother's substance abuse. The petition also alleged that the minor was at risk because she had been exposed to domestic violence in the mother's home. The petition averred appellant had physically abused the minor's mother.[2]

The juvenile court sustained the petition as amended, adjudged the minor a dependent child, and ordered DHHS to provide appellant with reunification services. Thereafter, appellant was arrested on various outstanding warrants. Appellant, who was born in Greece in 1962, has a 1998 misdemeanor conviction for assault with a deadly weapon, for which he was on probation until April 2002, in connection with an assault on the minor's mother.

The juvenile court ordered DHHS to provide appellant with supervised visitation with the minor, "unless assessed to be detrimental." Initially, DHHS determined that visits would be

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[2] The mother of the minor is not a party to this appeal.

detrimental to the minor, "due to [appellant's] volatile and impulsive behaviors." Thereafter, however, DHHS arranged supervised visits, some of which went well.

According to a June 2001 social worker's report, the minor was thriving in the home of her foster parents, with whom she had been placed in January 2001. She had bonded with her foster mother and foster father. The foster parents had told DHHS that, if the minor did not return to parental custody, they would be willing to adopt her.

In her June 2001 report, the social worker stated appellant had 90-minute weekly supervised visits with the minor. Appellant had missed two scheduled visits. Sometimes the minor engaged in lengthy bouts of crying both before and after visits with appellant. According to the social worker, appellant seemed to lack an understanding of the minor's abilities appropriate to her age. Moreover, apparently appellant also lacked basic skills to protect the minor. On the other hand, the social worker noted, appellant was gentle and affectionate with the minor.

The social worker opined that, if the minor were placed in appellant's custody, she would be at high risk. Acknowledging that appellant had completed his case plan and had stable employment, the social worker also noted he had not yet established a bond with the minor. Moreover, according to the social worker, "[appellant] consistently ignores the instruction of the Family Service Workers who coach him at the weekly supervised visits on expectations and parenting a two and one-

half-year-old child. He argues with the social worker both at the monthly meetings and in telephone conversations regarding this case. The social worker has been unsuccessful at directing the father to improve his parent skills, as have the Family Service Workers. He has also proven to be argumentative, wishing to discuss the origins of this case, rather than the present and his responsibilities to his child today."

In October 2001, the social worker reported that the visits were improving and appellant was cooperating with DHHS. In fact, the social worker described the risk of harm to the minor if she were placed with appellant as "low." According to the social worker, appellant was complying with the requirements of his service plan, and the minor was more comfortable during her visits with him. The social worker opined that the only significant barrier to reunification was the absence of a significant bond between appellant and the minor.

In January 2002, DHHS recommended termination of appellant's reunification services. According to the social worker, appellant had threatened to harm his therapist and, due to appellant's "inability to control his anger," visits with the minor had been moved from appellant's home to DHHS offices. The minor had become upset again before her visits with appellant. Moreover, appellant's "questioning of [the minor] about events in her life and recent past serve only to reinforce the observation that [appellant] does not have a good understanding of the [minor's] developmental age." Finally, the social worker believed appellant's behavior was "further

indication that he is unable to apply the lessons he allegedly learned during 52 weeks of anger management."

On May 7, 2002, the juvenile court terminated appellant's reunification services, found adoption to be the appropriate permanent plan for the minor, and scheduled a section 366.26 hearing for appellant. Thereafter, problems continued during appellant's visits with the minor, with the minor displaying reluctance to interact with appellant and appellant becoming angry at the minor. However, appellant was attentive to the minor.

On September 5, 2002, appellant filed a petition for modification of the juvenile court's previous order terminating his reunification services. Appellant sought an additional period of services and also indicated he wanted custody of the minor. The juvenile court scheduled an evidentiary hearing on the petition.

At the hearing on appellant's petition for modification, appellant's therapist and a psychologist who had evaluated appellant testified favorably for appellant. In her report, appellant's therapist opined that appellant could provide a stable environment for the minor. The psychologist concluded that the risk of harm to or neglect of the minor from appellant was low. Moreover, a security guard who saw appellant when he came to visit the minor testified he never observed appellant acting inappropriately.

Patricia Perry, the family service worker who supervised appellant's visits with the minor, testified that, although

occasionally appellant acted appropriately during visits, she noted that frequently appellant became angry at her and was demanding and critical of the minor. Perry did not believe the minor wanted to visit with appellant. Acknowledging the minor sometimes was affectionate with appellant, Perry told the juvenile court the minor had to be "coaxed."

During argument on the petition, counsel for appellant asked the juvenile court to order additional reunification services for appellant; he stated the request was being made "on behalf of [the minor] as well, who . . . has a right to know her parents and to participate in her culture and to learn the essence of being half Greek . . . ."

In denying the petition, the juvenile court stated in part: "The court has examined the issue of whether or not [appellant] has stated a change of circumstances or new evidence which would warrant the granting of his modification request. [¶] The circumstances are not the same as they were when the Court terminated reunification services for [appellant]. [¶] . . . [¶] . . . He has engaged in some counseling efforts, procuring services in that regard through his own efforts. He has maintained a visitation schedule with the child. However, there are still substantive issues which date back to the original dispositional hearing which would not make it possible for the Court at this juncture to either reinstate services for the father or to place the child with him. [¶] The Court cannot find that if reunification services were reopened for [appellant], that the child could either be safely maintained

or placed in his care within the next six months. [¶] . . . [¶] . . . The Court cannot find that if the child were placed in her father's care today, that he has satisfactorily addressed all of the issues required in his initial case plan to grant the modification request, and it would not be in [the minor's] best interests but would rather be to her detriment. [¶] . . . [¶] . . . This child is deserving of permanence. She can no longer wait for a parent to benefit from services."

At the October 22, 2002, section 366.26 hearing, appellant testified the minor was "very excited" when she visited with appellant. Appellant described his relationship with the minor as "[n]ormal" and "[g]ood." Appellant opposed the proposed adoption of the minor.

Counsel for appellant suggested the juvenile court could find that, based on appellant's relationship with the minor, termination of appellant's parental rights would be detrimental to the minor. Counsel then argued against termination of the relationship between appellant and the minor. The juvenile court found the minor adoptable, ruled that termination of appellant's parental rights would not be detrimental to the minor, and ordered appellant's parental rights terminated.

DISCUSSION

I

Appellant contends that, because his petition for modification made a showing of changed circumstances, the juvenile court abused its discretion in denying his petition for modification of the court's previous order terminating his

reunification services. Citing his efforts during visits with the minor and the changed circumstances he had shown, appellant also suggests he demonstrated that his proposed modification would be in the best interests of the minor. According to appellant, the court failed to accept his proof of changed circumstances.

Section 388 provides in part: "(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction. [¶] . . . [¶] (c) If it appears that the best interests of the child may be promoted by the proposed change of order, recognition of a sibling relationship, or termination of jurisdiction, the court shall order that a hearing be held . . . ."

A dependency order may be modified if the parent or other person shows a change of circumstance or new evidence and that

the proposed modification may be in the best interests of the minor. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 414-419.) The petitioning party has the burden of showing by a preponderance of the evidence that the modification is warranted. (*In re Audrey D.* (1979) 100 Cal.App.3d 34, 43; *In re Fred J.* (1979) 89 Cal.App.3d 168, 174.) The juvenile court's determination on a modification request is within its discretion. Such a determination will not be disturbed absent a showing of a clear abuse of that discretion. (*In re Jasmon O., supra,* at pp. 415-416; cf. *In re Corey* (1964) 230 Cal.App.2d 813, 832 [wards of court, similar provision, § 778].) Discretion is abused only when it is exercised "'in an arbitrary, capricious or patently absurd manner that result[s] in a manifest miscarriage of justice.'" (Cf. *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

In this case, contrary to appellant's claim, the juvenile court found that appellant had made a showing of changed circumstances, and scheduled an evidentiary hearing on his petition. At the hearing, the court heard testimony regarding the progress appellant had made. Moreover, in denying the petition, the court recognized that appellant had taken some steps on his own initiative to address his difficulties. However, the court did not believe that appellant had shown he was ready or would be ready within six months to parent the minor. The court also found that modification would not be in the best interests of the minor. It is noteworthy that appellant's petition itself did not aver *how* the best interests

of the minor might be promoted if the court granted the proposed modification.

The minor had been in a prospective adoptive home since January 2001, where she was doing well. Her foster parents were committed to providing a permanent home for the minor. According to the social worker, the minor appeared to understand the adoption process, and did not "appear to have any apprehension about being adopted by the current care providers." In sum, she had bonded to the prospective adoptive family.

The record reflects appellant received various services over a lengthy period of time. Despite those services, the social worker concluded that appellant was unable to apply what he had learned. Moreover, visitations with appellant frequently were problematic and upsetting to the minor. On this record, the juvenile court reasonably could conclude that continued visitation and the possibility of reunification with appellant would be disruptive to the minor and therefore not in her best interests.

In *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526-532 (*Kimberly*), cited by appellant, the appellate court warned against the juvenile court simply comparing the situation of the natural parent with that of a caretaker in determining a section 388 petition. It termed such an approach the "'simple best interest test.'" (*Id.* at p. 529.) Instead, the appellate court found that determining a child's best interests under section 388 required an evaluation of a number of factors, including the seriousness of the reason for the dependency action, the

existing bond between parent and child and caretaker and child, and the nature of the changed circumstances. (*Id.* at pp. 529-532.) The court suggested that it was unlikely a parent who lost custody because of a drug problem could prevail on a section 388 petition, whereas in a "dirty house" case, which was present in *Kimberly*, the chances of success were greater. (*Id.* at pp. 531, fn. 9, 532.) In *Kimberly,* the court concluded the decision to deny the section 388 petition was based largely and improperly on the juvenile court judge's adoption of the "'narcissistic personality' rationale," which the judge applied to the mother there. (*Id.* at pp. 526, 527, 533.)

In this case, in denying appellant's section 388 petition, the juvenile court did not discuss the factors analyzed in *Kimberly, supra,* 56 Cal.App.4th 519. However, evidence of all of the critical factors contained in *Kimberly,* including the basis of the dependency action, the relationships between appellant, the minor and the foster parents, and the nature of the alleged changed circumstances, *was* before the court. On the record before it, the court concluded that the petition and the evidence adduced at the hearing failed to demonstrate it would be in the minor's best interests to grant appellant an additional period of reunification services. We see no abuse of discretion in that determination.

In *In re Jasmon O., supra,* 8 Cal.4th 398, our Supreme Court upheld a termination of parental rights order. In doing so, the court stressed the importance of stability and permanence in the life of a minor. (*Id.* at pp. 419, 425-426.) The court stated,

"[W]hen a child has been placed in foster care because of parental neglect or incapacity, after an extended period of foster care, it is within the court's discretion to decide that a child's interest in stability has come to outweigh the natural parent's interest in the . . . child. [Citation.]" (*Id.* at p. 419.)

This case is like *In re Elizabeth M.* (1997) 52 Cal.App.4th 318. In that case, the juvenile court denied the mother's section 388 petition without an evidentiary hearing on several grounds, including the lack of a showing of changed circumstances or any demonstration that a change would be in the best interests of the minor. (*Id.* at p. 322.) The Court of Appeal affirmed, noting the absence of any showing by the mother that a change in placement would have promoted the minor's best interests. (*Id.* at p. 323.)

The juvenile court was required by statute (§ 388) to focus on the minor's best interests in deciding whether to grant the petition for modification. Those interests include the minor's needs for stability and permanence. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Childhood cannot wait for a parent to establish readiness for parenting. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) Here, the minor had bonded with her foster parents. Apparently appellant was still working on the problems that had contributed to the dependency proceedings. He had been unable to apply with consistency the lessons taught during 52 weeks of anger management therapy. On this record, it is not surprising the court ruled that the minor should not be

forced to wait until appellant participated in additional services to attempt to establish his readiness.

Under the circumstances of this case, the juvenile court did not act arbitrarily, capriciously, or beyond the bounds of reason in denying appellant's petition for modification. The court's conclusion that the minor's need for stability compelled denial of the petition *and* served her best interests was reasonable and is supported by the record. (Cf. *In re Edward H.* (1996) 43 Cal.App.4th 584, 594.) In sum, appellant failed to make the necessary showing, as required by section 388, that a modification might promote the best interests of the minor. (Compare *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416, with *In re Heather P.* (1989) 209 Cal.App.3d 886, 891.) There was no abuse of discretion or other error in the court's decision.

II

Relying on one of the statutory exceptions to adoption, appellant contends the juvenile court abused its discretion by terminating his parental rights. According to appellant, the court failed to properly weigh the "statutory directive to preserve close parent-child ties in the best interests of the child." Appellant argues that guardianship or a plan of long-term foster care would have served the best interests of the minor better than adoption.

"'At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption*.

[Citation.]' [Citation.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child." (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.)

One of the circumstances under which termination of parental rights would be detrimental to the minor is: "The parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) The relationship with the parent must outweigh the benefit to "the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

The parent has the burden of establishing the existence of any circumstances which constitute an exception to termination of parental rights. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1372-1373.) The juvenile court is not required to find termination of parental rights will not be detrimental due to specified circumstances. (*Id.* at p. 1373.) Even frequent and loving contact may not be sufficient to establish emotional

attachment between parent and child. (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728-729; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419; *In re Brian R.* (1991) 2 Cal.App.4th 904, 924.)

In this case, it is indisputable that some attachment existed between the minor and appellant. On the other hand, the social worker's reports suggest no significant bond existed. Moreover, although for a time he appeared to be developing good parenting skills, appellant's persistent habit of exploding in anger continued unabated throughout the proceedings. Moreover, during their visits, when the minor did not do what he wanted her to do, appellant became agitated.

At times, the minor did not want to visit appellant, and she became upset before and during visits. She once told appellant that he was making her nervous. Moreover, appellant lacked an adequate understanding of the minor's developmental age. He never progressed beyond supervised visits in his home, which had to be moved due to his explosive temper. Finally, according to the family service worker, after visits with appellant the minor displayed no separation anxiety and made no reference to the visits.

Section 366.26 requires both a showing of regular contact and a separate showing that the child actually would *benefit* from continuing the relationship. *In re Autumn H., supra,* 27 Cal.App.4th 567, 575-576, interprets the statutory exception to involve a balancing test, and both *In re Autumn H., supra,* at page 575, and *In re Beatrice M., supra,* 29 Cal.App.4th at

pages 1418-1419, posit a high level of parental-type involvement and attachment. Even assuming those decisions overemphasized the importance of the parental role, the record here does not support appellant's suggestion the minor would benefit from continuing her relationship with appellant in part because she "clearly knew he was her father." (Cf. *In re Amanda D.* (1997) 55 Cal.App.4th 813, 821-822.)

Appellant suggests the record establishes the existence of a beneficial relationship between the minor and appellant based on his appropriate visits with her and the importance of maintaining the minor's Greek heritage, precluding a finding of adoptability. The juvenile court was entitled to conclude otherwise. Evidence of a significant attachment by itself does not suffice. Instead, the record must show such benefit to the minor that termination of parental rights would be *detrimental* to her. (§ 366.26, subd. (c)(1)(A).) Here, the evidence suggested the most critical need of the minor was for stability. Moreover, the record shows appellant and the minor shared no significant bond. On the other hand, the minor had bonded with her foster parents.

In *In re Brandon C.* (1999) 71 Cal.App.4th 1530, cited by appellant, the juvenile court found it was in the best interests of the minors to establish a guardianship, rather than terminate parental rights, so the minors could maintain their relationship with their mother. (*Id.* at p. 1533.) Affirming, the Court of Appeal held that substantial evidence supported the juvenile court's conclusion that terminating parental rights would be

detrimental to the minors, since their mother had maintained regular, beneficial visitation with them. (*Id.* at pp. 1533, 1534, 1537, 1538.)

In re Brandon C., supra, 71 Cal.App.4th 1530, is distinguishable from the proceedings here. The *In re Brandon C.* court found ample evidence of benefit to the minors of continued contact with their mother. (*Id.* at pp. 1537, 1538.) Here, by contrast, and contrary to appellant's claim, the record supports the juvenile court's implied conclusion there would not be sufficient benefit to the minor if the relationship with appellant were continued. As the record shows, the minor had a great need for stability and security, which only adoption could afford.

Here, the issue is as follows: In light of the minor's adoptability, would a continued relationship with appellant benefit the minor to such a degree that it would outweigh the benefit the minor would gain in a permanent adoptive home? Substantial evidence in the record supports the juvenile court's implied answer in the negative.

After it became apparent appellant would not reunify with the minor, the juvenile court had to find an "exceptional situation existed to forego adoption." (*In re Autumn H., supra,* 27 Cal.App.4th at p. 576.) In this case, on the contrary, the court determined impliedly that the minor would not benefit from continuing her relationship with appellant to such a degree that termination of parental rights would be detrimental to her. Appellant had the burden to demonstrate the statutory exception

applied. We conclude appellant failed to make such a showing. Therefore, the court did not err in terminating appellant's parental rights. (*In re Amanda D., supra,* 55 Cal.App.4th at p. 821.)

DISPOSITION

The orders denying appellant's petition for modification and terminating appellant's parental rights are affirmed.

DAVIS, J.

We concur:

SCOTLAND, P.J.

SIMS, J.